Kimani (Suing as an administrator of the estate of Henry Kimani Kagonye) v Gachoka (Civil Appeal 268 of 2018) [2023] KECA 587 (KLR) (26 May 2023) (Judgment)

Neutral citation: [2023] KECA 587 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 268 OF 2018

DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA

MAY 26, 2023

BETWEEN

FREDRICK KAIGAI KIMANI .... APPELLANT

SUING AS AN ADMINISTRATOR OF THE ESTATE OF HENRY KIMANI KAGONYE

AND

DAMARIS WANJIKU GACHOKA .... RESPONDENT

(Being an appeal from the Judgment and Decree of the ELC in Nairobi (P. M. Njoroge, J.) dated 26th February 2018 in ELC Case No. 570 of 2008.)

JUDGMENT

1. The plaintiff in the trial court, one Rahab Mukami Kimani (deceased), suing in her capacity as an administrator of the estate of Henry Kimani Kagonye (her deceased husband), filed a suit in the High Court *vide* a plaint dated November 19, 2008 seeking an injunction to restrain the respondent from interfering, alienating, sub-dividing, trespassing or disrupting her quiet enjoyment of a parcel of land known as Muguga/Gitaru/1994 (hereafter "the suit land"), general damages for trespass, costs and interests thereon.

2. It was her contention that the respondent entered the suit land, deposited construction materials and proceeded to erect illegal structures thereon.

3. During the pendency of the suit, Rahab Mukami Kimani passed away and was substituted for the appellant, who is her son.

4. The respondent opposed the suit by way of a statement of defence dated December 15, 2008. She averred that she resided on land parcel number Muguga/Gitaru/1634; that the initial parcel of land was Muguga/Gitaru/68, but that a portion of it was acquired by the government for construction of

a road, and she was subsequently issued with the current title number Muguga/Gitaru/1634; that she acquired and took possession of her parcel in 1974; and that the dispute revolved around a boundary and thus, the appellant ought to have filed a complaint in the relevant lands' registry office.

5. The matter proceeded to hearing with the appellant, PW1, testifying that the respondent bought her parcel of land in 1974 and encroached onto their (family) land in 2001 by effecting a mutation No 109884 at Kiambu land registry. A surveyor's report dated July 23, 2010 showed that a portion of their land had been mistakenly marked as a road reserve, and that the mutation reduced it by 34 metres while increasing the respondent's land from10 to 44 metres.

6. In cross examination, he stated that the land was initially about 8 acres, but that it decreased in size due to the construction of a by- pass and Ndenderu Road for which the government compensated them.

7. PW2, Joseph Muchungu, a district surveyor at Kiambu, testified that, pursuant to a court order dated March 21, 2016, he visited the suit land on November 16, 2016 and subsequently filed a report. He found that the disputed portion fell within the appellant's land. The mutation form showed that there was a shift in boundary, which was improperly effected as the Land Registrar was not present, and did not append his signature on the mutation form. The acreage on the ground was different from what was registered. He used the 46th edition survey map that was published during adjudication and not the 69th edition, which was the latest. The disputed portion was 0.0094 hectares, which was part of land parcel No 067.

8. PW3, Isaac Njiru, the district land registrar at Kiambu, testified that he co-authored the report with PW2. He stated that his role was limited to providing ownership records and ascertaining the current registration status while the technical survey issues were left to the surveyor. According to him, parcel No 67 measured 8.3 acres while parcel No 68 measured 8.2004 acres.

9. For the defence case, the respondent testified as DW1. She adopted her witness statement dated January 27, 2016 as her evidence. She averred that she acquired her parcel of land in 1974, and that she has never added any portion to it, changed its boundary or encroached on anyone's land. It was her case that, on several occasions, the government had compulsorily acquired portions of her land, and that in 2007, she engaged a qualified surveyor to prepare a mutation form. According to her, the appellant was being untruthful.

10. DW2, Hazel Wanjiku Gachoka Gachunga, the respondent's daughter, also adopted her witness statement dated March 17, 2016 in evidence to the effect that the survey was done, but that during the process, the district surveyor was not willing to answer her questions. The surveyor used the 46th edition of the mutation map which he justified on the ground that it was within his discretion to use whichever edition he deemed fit.

11. DW3, Joseph Aganyo, a licensed surveyor, asked the court to adopt two reports he had prepared dated March 16, 2016 and February 16, 2017 respectively. In the former, he indicated that he subdivided land No 68 on December 5, 2000 resulting into 3 land parcels, namely Nos 1634 - 1636 *vide* mutation form No 109884. However, he noted that there was an erroneous line indicating a non- existent boundary, which he erased with white out correction fluid and forwarded the mutation form to the District Surveyor for examination and approval, who then forwarded it to the district land registrar for issuance of title deeds. The latter report indicated that the District Surveyor insisted on using the 46th edition of the RIM instead of the current one, and that he simply mapped out the road reserve without determining the acreage of both parcels. He noted from the ground that it was evident that both parties had maintained their boundaries over the years, and that there was an 18-metre road separating the two parcels of land.

12. DW3 further stated that, RIM can be modified to fit the ground situation. It was also his testimony that parcel No 1634 measured 0.407 hectares and that, if government-acquired land and road reserve were subtracted, it would measure 0.376 hectares. Meanwhile, parcel No 1994 was 2.71 hectares but, after several sub- divisions and mutations, it increased to 3.32 hectares. To him, the disputed portion ought to be surrendered to the government. He testified further, that the fact that he corrected the error on the mutation form by erasure did not in any way change the boundaries.

13. At the conclusion of the trial, the court dismissed the suit on ground that the respondent had not encroached on the appellant's suit land. Rather, she had reclaimed some of her land which the government had previously acquired, which in turn did not entitle the appellant to the reclaimed portion. The court also found that the appellant still retained the land that the government had compulsorily acquired from him.

14. Aggrieved, the appellant filed the instant appeal. In a memorandum of appeal dated August 3, 2018, he raised seven grounds of appeal which we have collapsed into four, namely:- that the learned judge erred in law and fact: in relying on the unsworn statement of Nellie Wanja who did not take the stand for scrutiny and determination as to the veracity of the contents of her unsworn statement; by failing to take into consideration the maps provided by the district land registrar and the district land surveyor, who were the custodians of the maps, and that the role of ascertaining the boundaries lay with the demarcation officer; by failing to find that the respondent fraudulently altered the mutation form number 16/841.109884 in an attempt to grab the suit property, blocking the 18-meter road that originally separated the properties, and that the 4-meter road was never surrendered to the Government of Kenya as a road, and at all times remained part and parcel of the suit property; and by giving preference to the evidence of DW3, Joseph Aganyo, who was a co- conspirator in amending government documents, over the evidence of the District Surveyor and the District Land Registrar, who were the custodians of the government land records.

15. It is the appellant's prayer that the appeal be allowed, the judgment of the ELC be set aside, and that costs of the appeal be awarded to him.

16. The appeal was canvassed by way of written submissions with limited oral highlights through a virtual platform on February 6, 2023. Learned counsel, Mrs Olembo, held brief for Mr Nyiha for the appellant while Ms Kariuki held brief for Mr Wekesa for the respondent. The appellant's submissions are dated September 20, 2022 while those of the respondent are dated June 22, 2022.

17. According to Mrs Olembo, the parties' individual parcels of land have always been separated by an 18-meter road and have undergone several sub-divisions, and that the resulting portions have been bequeathed to the parties' respective beneficiaries. She submitted that the appellant's father agreed to the construction of a diversion, which was a 4-meter road that truncated his land, creating a small triangular portion that is now the suit property. She contended that, when subdividing her property in 2001, the respondent blocked the 18-meter road, grabbed the triangular portion, and enlarged the 4-meter road into an 18-meter road, claiming that it was the original 18-meter road. The District Land Surveyor and the District Land Registrar visited the suit land and prepared a report, which supported the appellant's averments that the disputed portion belonged to him. Counsel urged that the ELC disregarded this report and instead gave credence to a surveyor hired by the respondent who was responsible for preparing the mutation form. She placed reliance on section 9 of the *Land Registration Act* in emphasizing that the land registrar and the land surveyor are the custodians of all government records that relate to land in Kenya.

18. On her part, Ms Kariuki submitted that, from the photographs adduced during the trial, the disputed parcel of land had housed a two-storey building, which was later demolished by the respondent after

the government acquired a portion thereof. She asserted that the disputed parcel was part of the respondent's property, which her husband purchased in 1974, and that there has never been a dispute of boundary encroachment nor have the boundaries ever changed. She submitted that the appellant had previously benefitted from a compulsory acquisition of land by the government in 1970, and that there was a subsequent acquisition of the respondent's portion in 1990, and another, for both parties in 2006. She contended that the suit property has since changed hands to beneficiaries and, as such, the dispute herein is an exercise in futility as the current registered proprietors are not parties to it.

19. Further, counsel posited that the parties have a clear demarcation between their respective parcels, and that the only issue is that the 18-meter road that the appellant was pursuing has since become smaller due to encroachment by both parties, and by a fence, which is marked by vegetation. It was her submission that, apart from the available land title documents, there was no proof that the appellant has lost any acreage of the deceased's land. The boundary between the two parcels of land is clearly marked by the 18-meter road. In addition, counsel asserted that, in arriving at its decision, the ELC not only relied on the statement of Nellie Wanja, but also analyzed all the evidence adduced and concluded that the appellant was untruthful, while the respondent's case was well corroborated.

20. Finally, it was Ms Kariuki's contention that the exercise conducted by both the District Land Surveyor and the District Land Registrar was marred by favouritism because the boundaries which the respondent has maintained since 1974 are reflected by the current land maps (mutations). She reiterated that the appellant failed to prove that the responded had trespassed into his land, and that the orders sought are in vain as the land has since mutated into different titles.

21. This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re analyze the entire evidence on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not, and give reasons either way. We must however bear in mind that we have neither seen nor heard the witnesses and give due regard to that. See the case of *Kenya Ports Authority v Kuston (Kenya) Limited* (2009) 2 EA 212 where this court held, *inter alia*, that: -

> " On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

22. Having considered the evidence as mandated and the respective submissions of the parties, we have demarcated the issues for determination to be: whether the trial court relied on extraneous evidence; whether the trial court failed to consider the evidence adduced by the District Land Registrar and the District Land Surveyor; whether the respondent fraudulently altered mutation form number 16/841.109884 in an attempt to grab the suit property; and whether the respondent trespassed into the appellant's land.

23. On the first issue, having appraised ourselves with the trial court's judgment, it is evident that the learned trial judge reproduced the contents of a witness statement of a person by the name Nellie Wanja, which had originally been recorded in kikuyu but translated into English. However, in the court's analysis and determination, the name Nellie Wanja only came up when the court referred to the evidence of the respondent. The court then observed that, Nellie Wanja was a neighbour to both the appellant and the respondent, and had been threatened not to appear in court. That is all. We find no other mention or reference to Nellie Wanja: There is no evidence that the court relied on her witness

statement in arriving at its verdict. Thus, the ground that the court relied on the statement of Nellie Wanja and therefore entertained extraneous evidence has no merit and must fail.

24. On the second issue, the appellant contends that the trial court ignored the evidence and report of the district land registrar and the district surveyor, who are the legal custodians of all land documents and instead preferred the evidence of PW3. In this regard, we have had a look at the reports prepared by the District Survey office pursuant to several court orders directing them to visit the suit land. The first report dated February 12, 2009, was inconclusive as the officers needed more time to locate the mutation forms that gave rise to parcels No Muguga/Gitaru 1634-1636.

25. In the second report dated July 23, 2010, the officer claimed to have visited the land on July 1, 2009. He found that the current boundaries had been in existence for a long time and conformed with the current Registry Index Map (RIM). However, they differed from machine plots which is what was used to prepare the first edition of RIM in 1959. For clarity, machine plots are drawings prepared directly from the aerial photographs taken for the demarcation of boundaries and which were used to compile the first edition RIM map for the area in issue after the demarcation around 1959. He noted that the boundaries on the machine plots had been changed to match the current position *vide* the mutation form prepared by PW3. They marked out the beacons for both the actual ground and machine boundaries, which were clearly marked in the RIM.

26. In the third report dated January 10, 2017, the officers found that the two parcels of land are separated by an 18-metre road, which had been blocked by the respondent at some point; that there was a 4- metre road running through the appellant's land which was not in the RIM; that during subdivision by the respondent, she shifted the 18- metre road and occupied the 4-metre road, thus increasing her acreage and shifting the boundaries. Further, that the disputed portion of land measured 0.0094 hectares; that the respondent's land on the ground measured 0.339 hectares; and that the registered acreage was exaggerated to 0.401 hectares, while the appellant's land measured 3.0416 hectares instead of 3.0510 hectares against the registered acreage of 3.32 hectares.

27. In their evidence, PW2 and PW3 reiterated the contents of the latter report. Indeed, PW2 testified that he opted to use the 46th edition of the RIM in exercise of his discretion upon noting that, several changes had taken place on the mutation form. On the other hand, PW3 testified that, on first registration, the appellant's land measured 8.3 acres, and that it was subdivided into seven parcels, and later amalgamated so that the current acreage, according to the green card, is 3.2 hectares or 8.2004 acres.

28. In its judgment, the trial court found that the evidence of PW2 contradicted the appellant's case in which he was claiming 0.25 acres while PW3's evidence was that the disputed portion was 0.023 hectares, which is almost a tenth of what he (appellant) was claiming. Essentially, PW3's evidence was that the current acreage was equivalent to what the suit land measured in 1971, which the court found to be an impossibility, taking into account the compulsory acquisition by the government.

29. We have scrutinized the documents availed by the parties. It would appear that the appellant's land was first registered in 1958. It was then sub-divided into 6 parcels in 1989 being; 865 measuring 4.85 acres, 866 measuring 0.64 acres, 867 measuring 0.25 acres, 868 measuring 0.25 acres, 869 measuring 0.46 acres and 870 measuring 0.245 acres, the total acreage being 6.7 acres. It was then amalgamated in 2005 to Muguga/Gitaru 1994 which, according to the green card, search certificate and the appellant's evidence, now measures 3.32 hectares or 8.2 acres.

30. Factoring the compulsory acquisition by the government of a portion of the appellant's land in 1971 of 0.548 acres, and in 2006 of 0.195 acres, it is unfathomable that the appellant's land could have increased or expanded over time. On the other hand, the respondent's land was also first registered in 1958. The

government compulsorily acquired a portion thereof in 1990 measuring 1.07 hectares and another in 2006 measuring 0.013 and 0.030 hectares, the total acreage compulsorily acquired being 1.113 hectares or 2.75 acres. She subdivided the land into 3 portions in 2001, being parcel Nos 1634 measuring 0.407 hectares, 1635 measuring 0.921 hectares, and 1636 measuring 0.322 hectares, and a road measuring 0.038 hectares, all totalling to 1.688 hectares or 4.17 acres. When this acreage is added to the acquired land measuring 2.75 acres, it equals to 6.92 acres.

31. We cannot, therefore, fault the learned trial judge for not adopting the District Surveyor's report as evidence. Neither the Land Surveyor nor the Land Registrar could adequately explain how the appellant's land was still the same exact measurement as it was as at the time of its first registration in 1958. Further, the disputed portion, according to them, was 0.094 hectares or 0.233 acres. This is not the portion the appellant is claiming, and, in any case, the acreage is negligible.

32. Another twist arises from the earlier reports of 2009 and 2010. PW2 and PW3 had indicated that the parties had maintained their respective boundaries and, so, they proceeded to mark the beacons with the actual ground position reflected in the RIM. These reports were made during the subsistence of the suit. Hence, it is not clear to us, at what point the respondent ignored the beacons set up by the two witnesses or encroached into the appellant's land.

33. From the chronology of events as enunciated above, we are of a similar mind as the learned trial judge that the appellant was not truthful and to quote him, "one cannot have his cake and still retain it."

34. On the third issue, the appellant's evidence was that the respondent, using a mutation form, altered the actual measurements of the land. DW3, the author of the impugned mutation form, testified that he prepared the mutation form and forwarded it to the District Land Surveyor for processing and issuance of new titles, which were issued. The mutation was registered at the lands' registry and forwarded to Survey of Kenya, Ruaraka for RIM amendment. That it was during the drawing of the RIM that he noticed there was a line that was wrongly drawn indicating a boundary which was non- existent, prompting him to effect the correction with white out correction fluid.

35. Interestingly, the appellant did not adduce any evidence to show that there was actually a boundary at the same position as the wrongly drawn line that was erased. Neither did he prove that the error and correction were done in bad faith and, therefore, intended to defraud him of his land. Instead, they were properly explained, which explanation we think was plausible.

36. This court in *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR held that:

> " The next and only other issue is fraud. The law is clear and we take it from the case of [2000] eKLR, where Tunoi, JA (as he then was) states as follows:
>
> "It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."

37. In view of the foregoing, this ground must fail.

38. On the last issue, having held that the appellant is already holding onto more than he ought to, there can be no possible way that his land

has been encroached onto by the respondent or any other party. From the evidence on record, the two parcels of land are distinct and separated by an 18-metre road. It is clear that the respondent has

occupied her portion since 1974, and that the boundaries have never changed since 1958. It follows, therefore, that the respondent has not trespassed into the appellant's land.

39. In the end, having re-evaluated the entire evidence on record, we find that the appeal is unmeritorious. We accordingly dismiss it with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY, 2023.

D. K. MUSINGA, (P.)

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR